Hughes Hubbard & Reed

FDIC Win in BankUnited Decision Could Set Standard for Future Bank Failures

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Hughes Hubbard won a precedent-setting victory for the FDIC when a U.S. Bankruptcy Judge prevented the creditors' committee of BankUnited's holding company from filing certain claims relating to the bank's failure.

Judge Laurel M. Isicoff of the U.S. Bankruptcy Court of the Southern District of Florida entered an order granting, in part, the motion for summary judgment filed by the FDIC as receiver for BankUnited. The order came in response to an adversary action, filed by the creditors' committee, seeking a declaration as to whether three counts asserted in the committee's proposed complaint against two former senior officers and directors of BankUnited and its holding company, were direct or derivative bank claims. Judge Isicoff held that two of the three counts set forth in the proposed complaint are indeed derivative claims belonging exclusively to the FDIC.

Judge Isicoff's decision for the FDIC is the first favorable bankruptcy court ruling on a "downstreaming" claim, or one that seeks damages relating to funding by the holding company of the subsidiary bank. The order provides a useful test for future cases wherein the FDIC may be forced to fight over ownership of arguably derivative claims.

The decision will likely cause a trustee or creditors' committee of a bankrupt holding company some hesitation in pursuing broad-based claims against directors and officers of the subsidiary bank, particularly where the board of directors of both entities overlap, as in this case.

BankUnited's failure, estimated to be $4.9 billion, was one of the largest and costliest of 2009 and the financial crisis. The bank was put into receivership by the FDIC on May 21, 2009.

Dennis Klein, Aviva Wernick and Ross Paolino represented the FDIC in the case.

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